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No. 567

Supreme Court of the United States

OCTOBER TERM, 1954

STATE OF MONTANA, EX REL. FORD JOHNSON,
Petitioner,
v.
THE STATE BOARD OF LAND COMMISSIONERS OF THE STATE OF MONTANA, AS GOVERNING BOARD OF THE DEPARTMENT OF STATE LANDS AND INVESTMENTS; J. HUGO ARONSON, GOVERNOR OF THE STATE OF MONTANA, PRESIDENT OF SAID BOARD; MARY M. CONDON, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF MONTANA; SAM W. MITCHELL, SECRETARY OF STATE OF THE STATE OF MONTANA; ARNOLD H. OLSEN, ATTORNEY GENERAL OF THE STATE OF MONTANA, AS MEMBERS OF SAID BOARD; AND LOU W. BRETZKE, COMMISSIONER OF STATE LANDS AND INVESTMENTS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

REPLY BRIEF FOR PETITIONER

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The Brief in Opposition filed herein does not discuss the importance of the question presented by the Petition, nor does it seek to sustain the interpretation of the Congressional Enabling Act by the court below. Rather, the brief seeks to avoid both these matters by asserting (a) that the case is moot; (b) that no Federal question is involved; and (c) that there is no conflict of decisions. All of these contentions are without substance, but since the first two of

them are not covered by the Petition, this brief reply appears to be warranted.

I

Respondents' contention that the action is moot (pp. 1-6) is grounded on the argument that the original relator, Willis B. Jones, sought injunctive relief solely with respect to a proposed leasing of some 76 parcels of school land, and that as of the present time all of these parcels have either been leased, or applications for leases with respect to them have been withdrawn. There are two answers.

1. First, even were the matter to be considered, as respondents seek to do, solely on the basis of the original application for injunction filed by relator Willis B. Jones, there is still a controversy before this Court. Jones's original application requested a temporary restraining order as well as a permanent injunction, and hence described in detail the 76 parcels which were shortly to be leased. However, Jones's application also sets forth (R. 5) that "unless restrained by this court, the defendants will proceed to receive bids for and will issue leases for oil and gas upon terms" inconsistent with the 1953 statute. His prayer (R. 6) was for a temporary injunction and a temporary restraining order to prevent respondents from "conducting any sale or receiving any bids upon any lease for oil and gas upon any school trust lands upon any terms other than those prescribed and established by the Legislature of the State of Montana in Chapter 122, Montana Session Laws, 1953", and that upon final hearing a peremptory writ issue "commanding said defendants to do and perform such acts and things as may be necessary in the premises".

Neither prayer is limited as to time, nor confined to the 76 proposed leases. Even were the prayers ambiguous, however, that ambiguity has been resolved by the courts below. Neither the trial court (R. 72), nor the Supreme

Court of Montana (Pet. App. p. 1) construed the application as limited to any particular parcels of school lands. This Court has recognized since *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 308-309, that an application for injunctive relief does not become moot because the conduct immediately complained of has terminated, if there is a likelihood that the same conduct will be continued in the future. See *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260; *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43. Here there is not a likelihood, but a virtual certainty, that in future leases of Montana school lands respondents will continue to ignore the 1953 Montana statute—unless an injunction issues. Indeed, they have already done so; the Brief in Opposition, by annexed affidavit, admits that shortly after the trial court injunction was dissolved by the court below, several leases were entered into by respondents which did not comply with the 1953 statute. Respondents do not suggest that they have changed, or will change, their position that the 1953 law is invalid, nor do they assert any intention of complying with it in the future. Respondent Olsen, as Attorney General, has advised the State Board of Land Commissioners that the 1953 law is invalid, and the majority of the Board has formally "accepted" that opinion. See R. 18. *Cf. United States* v. *Trans-Missouri Freight Association*, 166 U.S. at p. 309. Respondent's violent attack on the policy of the 1953 law (Brief, pp. 10-11) leaves no doubt that they have no intention of abiding by its terms.

2. Even if petitioner were limited to the allegations and prayer for relief contained in the original Jones application, therefore, the cause would not be moot. But apart from that, even respondents do not deny that petitioner's Complaint in Intervention, and the prayer for relief therein, are in no way limited to the 76 parcels of school land which have now been leased or on which pending

applications have been withdrawn. The Complaint in Intervention sought a continuing injunction against *any* lease of *any* Montana school lands which did not comply with the Montana statute. The prayer (R. 21) was for a permanent injunction "directing that any oil and gas leases on public school lands . . . be in accordance with the provisions of" the 1953 law, and "restraining the State Board of Land Commissioners from issuing oil and gas leases on such public school lands in accordance with and pursuant to" the pre-1953 law.

For the reasons noted above, *this* issue is very much alive; respondents will issue future leases in accordance with the 1953 act only if so directed by injunction. Respondents tacitly admit (p. 3) that petitioner's Complaint in Intervention presents a continuing controversy which is *not* moot, but seek to avoid *that* controversy by asserting that because petitioner is an intervenor, he "could not demand relief to which the original applicant would not be entitled."

Montana law imposes no such restrictive rule. On the contrary, the Montana statute (Mont. Rev. Codes 1947, Sec. 93-2826) specifically provides for the filing, with leave of court, of a complaint in intervention, to which the parties to the original action "may answer or demur . . . as if it were an original complaint". The statute, moreover, expressly contemplates a complaint in intervention which presents new and different allegations and prayers for relief by providing that it may even take the form of "demanding anything adversely to both the plaintiff and the defendant".[1] The trial judge, of course, has discretion, in

[1] In fact, new and different allegations or prayers for relief were made in both the Montana cases cited in respondent's brief (p. 3). State Bank of New Salem v. Schultze, 63 Mont. 410, 209 P. 599 (1922); State ex rel. Westlake v. District Court, 118 Mont. 414, 167 P. 2d 588 (1946). In the Schultze case, where the right of the intervenor to seek different relief was upheld, the court stated (63 Mont. at p. 420; 209 P. at p. 603): "While it is true that an intervener must accept the action pending as he finds it at the time of the intervention [citing cases etc.], yet

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granting or denying leave to file the complaint in intervention, "as to what measure of latitude he shall allow one who seeks to intervene, keeping mind at all times the purpose to do justice to one who applies in good faith", and the purpose of the intervention statute "to avoid circuity of action and needless multiplicity of suits". *State ex rel. Westlake* v. *District Court*, 119 Mont. 222, 235, 173 P. 2d 896, 902 (1946).

Here petitioner's Complaint in Intervention did not introduce any fundamentally new issues, and the relief he sought, if different at all from that sought by the original relator, was merely supplemental. When the trial court allowed the Complaint in Intervention (R. 30), petitioner became a party in his own right. Respondents filed a demurrer (R. 46), as the statute provided, without challenging petitioner's right to intervene or the scope of the relief sought. The trial court found that all of the material allegations of the Complaint in Intervention were admitted by the pleadings, and issued a final injunction in substantially the form in which petitioner had requested it. R. 73-74. The court below likewise accepted the case on that basis, with no suggestion that petitioner was limited in any such way as now suggested by respondents, and with no suggestion that the controversy was limited to the 76 parcels of land noted in the original injunction application. See Pet. App. pp. 1-2.

For either or both of these two reasons, therefore, the case is by no means moot. Indeed, developments since

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thereafter his rights are as broad as those of the other parties to the action." The intervenor, in other words, may not challenge the jurisdiction and pleadings of the original suit as they stand when he petitions for intervention, but if his intervention is allowed, the Complaint in Intervention stands as asserting a cause of action on his behalf just as it would if it had been filed as an original pleading. In a sequel to the Westlake case cited by respondents, the Supreme Court of Montana reviewed the Montana cases on intervention, and upheld the right of an intervenor to introduce new issues. State ex rel. Westlake v. District Court, 119 Mont. 222, 173 P. 2d 896 (1946).

the action was instituted in 1953, rather than rendering the case moot, have rather made the controversy between petitioner and respondents even more clearcut. Petitioner, as a taxpayer on property for the support of the public schools in Lewis & Clark County (R. 17) has suffered substantial direct pecuniary loss as a result of respondents' action in disregarding the provisions of the 1953 law. Petitioner will continue to suffer such losses unless he receives the relief sought by his Complaint in Intervention, which was granted by the trial court but set aside by the court below. The official statistics contained in the separate brief filed in this Court by respondent Governor Aronson (see pp. 4-7) give additional substance to the allegations of irreparable damage to petitioner contained in his Complaint in Intervention, R. 21. These figures illustrate in striking fashion how deficiencies in income from oil and gas leases of school lands, which it is alleged will result from respondents' improper disregard for the 1953 law, are required by State law to be made up by additional levies on petitioner's property in Lewis & Clark County, and how in fact those levies have occurred since the decision by respondents to ignore the 1953 law as invalid.

II

Respondents' second contention—that there is no Federal question presented—is of even less substance. Respondents do not deny, of course, that the interpretation of Section 11 of the Enabling Act as amended by Congress in 1948 presents a Federal question (cf. *Montana ex rel. Haire* v. *Rice*, 204 U.S. 291, 298), but they seek to avoid that conclusion by arguing (pp. 6-7) that the decision below rested upon an interpretation of the Montana statute accepting the amendment (Montana Laws 1949, Chapter 18) rather than an interpretation of Section 11.

The argument is refuted simply by reading the opinions below. The Supreme Court of Montana rested its decision

solely on an interpretation of the Congressional Enabling Act itself, not on any State legislative action. See Petition, pp. 7-8.

Furthermore, even a casual consideration of the pertinent Montana legislation shows that respondents' contention has no substance. The Montana legislature first memorialized Congress to amend Section 11 of the Enabling Act in order to accord to Montana the authority to lease school lands for as long as oil or gas was produced thereon (March 3, 1947, 93 Cong. Rec. 2426). When the amendment was enacted by Congress, Montana, as respondents concede (p. 7), unconditionally accepted that amendment. Montana Laws 1949, Chapter 18. Finally Montana exercised this newly granted authority in unmistakable terms in the 1953 Leasing Act (quoted in Petition, p. 4). Under these circumstances, even if the decision of the court below were ambiguous, which it is not, it is patent that what was involved was the interpretation of Section 11—a Federal question—and not an interpretation of Montana's acceptance of the Federal Act.

III

The conflict between the decision below and that of the Supreme Court of North Dakota in *State ex rel. Raasch* v. *Amerada Petroleum Corp.*, 78 N.D. 247, 49 N.W. 2d 14 (1951), has already been noted in the Petition (pp. 17-19), and in any event is not determinative; the importance of the question presented is alone sufficient to warrant review by this Court. Respondents are in error, however, in denying that a conflict exists (pp. 7-8). The opinion of the Supreme Court of North Dakota makes it clear that the plaintiff in that case attacked, under this very provision of the Enabling Act, the validity of a lease for a fixed term and as long thereafter as oil or gas was produced—the form of lease required by the 1953 Montana law—and the court upheld the validity of the lease. The At-

torney General of North Dakota is clearly correct in concluding in his brief filed in this proceeding, as *amicus curiae*, that

> "The decision of the Supreme Court of Montana which is sought to be reviewed here is squarely in conflict with the *Amerada Petroleum Corp.* case on the interpretation of Section 11 of the Enabling Act, as amended."

CONCLUSION

For the reasons set forth in the Petition, now concurred in and reinforced by the brief filed by the Governor of Montana, and by the briefs filed by States of North Dakota and South Dakota as *amici curiae*, the prayer of the Petition should be granted.

Respectfully submitted,

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